IN THE SUPREME COURT OF MISSOURI

SC92208

ARNAZ CRAWFORD,
Appellant,

v.

DIVISION OF EMPLOYMENT SECURITY,
Respondent.

APPEAL FROM THE LABOR AND INDUSTRIAL RELATIONS COMMISSION

RESPONDENT'S SUBSTITUTE BRIEF

JEANNIE DESIR MITCHELL #60177
421 East Dunklin Street
Jefferson City, Missouri 65101
(573) 751-3844
(573) 751-2947 (fax)

Attorney for Respondent

Table of Contents

Table of Authorities

Cases

Cases, cont.

Constitution and Statutes

Constitution and Statutes cont.

Other Authorities

Introduction

This is a consolidated appeal from decisions of the Labor and Industrial Relations Commission ("Commission") involving Arnaz Crawford's ineligibility for unemployment compensation. Crawford received unemployment benefits for the period of July 26, 2009 through March 20, 2010 because he certified that he was "able to work."

After Crawford found out that he was eligible to receive Social Security benefits he told the Division of Employment Security ("the Division") that he no longer needed unemployment benefits because he was not "able to work" and that he had not been "able to work" since the week of December 23, 2009. As a result, the Division issued new determinations finding that Crawford was ineligible for unemployment benefits because he was not "able to work" beginning December 20, 2009. The Division also issued overpayment determinations because Crawford received unemployment benefits during periods of ineligibility. The Appeals Tribunal and the Commission affirmed the determinations. This appeal results from those decisions.

The legal file and transcript make up the entire record in this case. There are two volumes of transcript. Volume 1 will be referred to as "Tr1. ____" and Volume 2 will be referred to as "Tr2. ____." The legal file will be referred to as "LF."

Statement of Facts

On January 29, 2009, Arnaz Crawford was fired from Wal-Mart after working for the company for approximately six months. (Tr1. 43, 44). After losing his job, Crawford "went to the doctor to see if [he] could control [his] actions around people." (Tr1. 39). Crawford has schizophrenia. (Tr1. 75). He wanted to see if the doctor could help him control his condition so that he would be able to work. (Tr1. 39, 44). His doctor told him that his condition prevented him from working. (Tr1. 39, 45). With the advice of his doctor, Crawford voluntarily admitted himself into a state mental facility, where he remained for one week. (Tr1. 44, 74). When he was released, Crawford looked for work. (Tr1. 45, 46, 47-48).

On February 4, 2009, Crawford filed for Social Security disability benefits with the Social Security Administration ("SSA"). (Tr1. 33, 72, 79). He was denied. (Tr1. 69). He appealed the denial and requested a hearing before an SSA administrative law judge. (Tr1. 69, 72).

On July 27, 2009, Crawford filed an initial claim for unemployment benefits. (LF 1; Tr2. 162). Crawford notified the Division that he had applied for Social Security benefits. (Tr1. 70). The Division established his benefit year as beginning on July 26, 2009 and ending July 31, 2010. (LF 1; Tr2. 159). In the meantime, Crawford continued to look for work. (Tr1. 45, 46, 47-

48). He was able to find a few jobs, but was unable to keep the jobs for more than one or two days. (Tr1. 34, 46, 69).

Crawford described his condition and its effect on his employment as follows:

> I'll talk to myself, and I'll pace, and I'll hear voices around customers and stuff like that, and I'm not aware of it. And—and I'd do it over and over again, the manager would tell me to stop. And—and I'll keep doing it, and eventually I get fired.

(Tr1. 34).

Crawford received regular unemployment benefits and stimulus payments for the period of July 26, 2009 through January 23, 2010. (Tr2. 163, 178-186). Crawford exhausted his regular unemployment benefits, so the Division established a new benefit year for his emergency unemployment compensation ("EUC") claims beginning January 24, 2010. (Tr2. 198). Crawford received EUC and stimulus payments for the period of January 24 through March 20, 2010.[1] (Tr2. 199-202). These payments were the same

[1] Documents relating to Crawford's regular unemployment benefits have "REG" at the top of the page. (*See* Tr2. 177). Documents relating to Crawford's EUC have "FSC" at the top of the page. (*See* Tr2. 198).

amount as his regular unemployment, a weekly payment of $195 and $25 respectively. *See* Tr2. 163, 178-187 *and* 199-202.

On December 29, 2009, Crawford had a hearing before the SSA. (Tr1. 72). On March 2, 2010, the SSA found that Crawford was disabled under the Social Security Act[2] and that he had been disabled since January 29, 2009. (Tr1. 79-80). The decision was based, in part, on the following findings:

- In May 2009, Crawford's treating psychiatrist conducted a mental capacity assessment of Crawford and found "marked limitations in understanding and memory; and moderate to marked limitations in sustained concentration, persistence, social interaction, and adaptation."
- In October 2009, Crawford's treating psychiatrist indicated that because of his mental illness, Crawford could not work and that Crawford was currently under psychiatric care.
- Crawford "heard voices, talked to himself, paced, had anger problems, and was forgetful."
- Crawford "was fired from a number of jobs for talking to himself or violent behavior."

[2] 42 U.S.C. 1382c(a)(3)(A)

- During a psychological consultative evaluation conducted at the SSA's request, Crawford "appeared potentially dangerous to himself. … He exhibited memory problems. … His concentration was poor."
- "Stress triggered many of his problems. Working around other people was stressful. Being supervised also caused stress."

(Tr1. 75, 77).

On March 22, 2010, Crawford called the Division and notified a Division deputy that he had been found eligible to receive Social Security disability benefits. (Tr1. 126). The deputy's written account of Crawford's statement is as follows:

> I was told that I needed to contact the [D]ivision and let you know I received my disability. I am 100% disabled. I went to court 12-23-09[3]. . . . I have not been able to work and maintain my employment because of my disability. What do I do with the check from the [D]ivision that I will be receiving Tuesday? I am not qualified for it because I am receiving my disability. . . . I claimed every week because I looked for work every week but no one would hire me because I am mentally disabled. I am not able

[3] This was the date of the hearing before the SSA. (Tr1. 72).

to work[.] I haven't been able to work for a long time or I would not be getting my disability.

(Tr1. 126).

Crawford spoke to a Division deputy again on March 25, 2010. (Tr1. 125). He told the deputy that he did not understand the questions that he was asked on March 22 when he stated that he could not work due to his disability, and that he was able to work full-time until the previous week, but his doctor had told him to apply for disability. (Tr1. 125).

On March 27, 2010, the SSA found that Crawford was entitled to $871 per month in Social Security disability insurance ("SSDI") beginning July 2009. (Tr1. 99). His SSDI payments were not reduced by the amount of unemployment that he received. (Tr1. 99-104).

On March 29, 2010, the SSA found that Crawford was entitled to $674 per month in supplemental security income ("SSI") from March 1 through August 31, 2009. (Tr1. 81). Crawford was not entitled to SSI payments beginning September 1, 2009 because his monthly income from unemployment benefits, which varied from $880 to $1100, was more than the

SSI payment.[4] (Tr1. 82, 92-98). Crawford had until June 2, 2010 to appeal this decision. (Tr1. 84).

On March 31, 2010, a Division deputy issued two redeterminations finding that Crawford was ineligible for unemployment benefits beginning December 20, 2009, the period that he received regular benefits, because he was not able to work[5] and again beginning January 24, 2010, the period that he received EUC, because he was not able to work. (Tr1. 127, 141).

On April 13, 2010, a Division deputy issued two overpayment determinations finding that Crawford was overpaid benefits the week beginning July 26, 2009 and December 20, 2009 through March 20, 2010 because he received benefits during periods of ineligibility. (Tr2. 191, 205).

---

[4] The SSA calculates SSI payments based on an individual's prior month's income. 20 C.F.R. 416.420 and 1100. Although Crawford's benefit year began on July 26, 2009, he did not begin receiving payments until August 2009. (Tr1. 178). That is likely the reason that the SSA began considering his unemployment benefits in September 2009.

[5] It appears that the deputy began the period of ineligibility on December 20, 2009, because according to Crawford that was when he was completely disabled and unable to work. (*See* Tr1. 124).

After Crawford received the Division's overpayment determinations, he still had six weeks to appeal the decrease of his SSI payments. (Tr1. 84 and 191, 205).

Claimant appealed the deputies' ineligibility and overpayment determinations to the Division's Appeals Tribunal. (LF 5-6). The Appeals Tribunal held an in-person hearing on June 2, 2010. (Tr1. 1; Tr2. 1). Crawford was represented by counsel. (Tr1. 2; Tr2. 2). Crawford and his mother testified at the hearing. (Tr1. 2; Tr2. 2).

After all the evidence in the case was submitted, the Appeals Tribunal affirmed the deputy's determinations. (LF 11, 33, 53, 74). The Appeals Tribunal found that Crawford has borderline intellectual functioning, major depressive disorder, and schizophrenia and that he "is mentally incapable of full-time competitive employment." (LF 9, 51).

Crawford filed an application for review to the Commission. (LF 15). The Commission affirmed the Appeals Tribunal's ineligibility decisions and made supplemental findings. (LF 18, 60). The Commission wanted to make clear, "[w]e are persuaded that there could be certain circumstances where a claimant is determined disabled by the SSA but able to work under section 288.040.1(2), RSMo.[,] of the Missouri Employment Security Law. . . . But we are also persuaded that the case before us is not that situation." (LF 18, 60). The Commission commended Claimant's willingness and earnest attempts to

find work, but stated "such factors are more relevant to his 'availability' for work under the statute." (LF 18, 60).

The Commission summarily affirmed the Appeals Tribunal decisions on the overpayment issues. (LF 40, 81).

This appeal followed.

Argument

Standard of Review

Judicial review of Commission decisions in employment security cases is governed by Article 5, Section 18 of the Missouri Constitution and section 288.210, RSMo. 2000.[6] Absent fraud, factual findings are conclusive if supported by substantial and competent evidence. § 288.210, RSMo. 2000. The Commission's decisions may not be modified, reversed, remanded, or set aside unless the Court finds that the Commission acted without or in excess of its powers, the decision was procured by fraud, the facts found by the Commission do not support the award, or there was no sufficient competent evidence in the record to support the award. *Id.* The Court reviews questions of law *de novo*. *Difatta-Wheaton v. Dolphin Capital Corp.*, 271 S.W.3d 594, 595 (Mo. banc 2008).

The employment security law is construed liberally. § 288.020.2, RSMo. 2000. The statute's words are given their plain and ordinary meaning. *St. John's Mercy Health System v. Div. of Employment Sec.*, 273 S.W.3d 510, 514 (Mo. banc. 2009).

[6] Hereinafter, statutory references are to the 2011 Cumulative Supplement of the Revised Statutes of Missouri unless otherwise noted.

I. The Commission did not err in affirming the Appeals Tribunal's decisions that Crawford was ineligible for benefits because (a) substantial and competent evidence supports the Commission's finding that Crawford's disability rendered him not "able to work" under section 288.040.1(2), RSMo.; (b) Crawford failed to preserve the argument that the decisions are void because the Division lacked good cause to reconsider the prior determinations; (c) the Division had good cause to reconsider its prior determinations after learning that Crawford was not "able to work" because his receipt of benefits was in conflict with section 288.040.1(2); and (d) the decisions are not contrary to sections 288.215, RSMo. 2000, and 288.040.3, RSMo., or 8 C.S.R. § 10-3.050(3). (In response to Crawford's Point I)

a) The Commission's finding that Crawford was not "able to work" under section 288.040.1(2) is supported by substantial and competent evidence in the record.

The Commission properly found that Crawford was ineligible for

unemployment compensation from December 20, 2009[7] through March 20, 2010 because he was not "able to work" under section 288.040.1(2). (LF 18, 60).

A claimant must be able and available for work in order to be eligible for unemployment compensation. § 288.040.1(2), RSMo. The statute does not define these terms, "able to work" and "available for work." They are factual determinations that are made on a case-by-case basis. *See RCPS, Inc. v. Waters*, 190 S.W.3d 580, 588 (Mo. App. S.D. 2006) ("available for work" differs from case to case).

RCPS, Inc. is instructive here. In that case, the Commission found that the claimant, Waters, was ineligible for benefits from June 5 through July 9, 2005, because her double vision prevented her from working. *Id*. at 584, 588. Waters became eligible to receive benefits beginning July 10, 2005, because she obtained new glasses that corrected her double vision. *Id*. As of that

---

[7] The Commission's decision states that the period of ineligibility began on December 26, 2009. (LF 60). This is a typographical error. A benefit week is from Sunday through Saturday. 8 C.S.R. § 10-3.010(8). December 26, 2009 is a Saturday. The beginning of that week is December 20, 2009. Also, the deputy's determination was that Crawford was ineligible beginning December 20, 2009. (LF 44).

date, the vision problem was no longer an obstacle to her "pursuit of employment." *Id.* at 588. The court affirmed the Commission's decision. *Id.*

Even though the court seems to only discuss Waters's "availability for work" in its opinion, the court's analysis also considers Waters's ability to work. *See id.* (discussing in detail factors that render a claimant not "available for work"). The court found that Waters's vision problem did not prevent her from working after July 9, 2005. *Id.* This finding touches upon Waters's ability to work, not her availability for work. Also, the court denied the employer's point two in its entirety. *Id.* at 589. In point two, the employer argued that Waters was neither "able to work" nor "available for work". *Id.* at 587. Thus, in finding for Waters on this point, the court's holding is that Waters was both "able to work" and "available for work" when her vision problem was corrected. As of July 10, 2005, Waters's medical condition did not restrict her from working.

Here, there is sufficient evidence that Crawford was not "able to work." In the early part of 2009 Crawford went to his doctor to see if the doctor could help him control his condition so that he could work. (Tr1. 39, 44). The doctor told him that he was really ill and that she did not want him to work. (Tr1. 45). The doctor also advised him to admit himself into a hospital. (Tr1. 44). Crawford voluntarily admitted himself into a state mental hospital where he stayed for one week. (Tr1. 74).

Crawford looked for work after he was released from the hospital. (Tr1. 45). He found a few jobs, but he was unable to keep the jobs for more than one or two days. (Tr1. 34, 46, 49). He admitted that when he found a job, he was often fired because of his condition. (Tr1. 34). He testified,

> I'll talk to myself, and I'll pace, and I'll hear voices around customers and stuff like that, and I'm not aware of it. And--and I'd do it over and over again, the manager would tell me to stop. And--and I'll keep doing it, and eventually I get fired.

(Tr1. 34).

By itself, Crawford's testimony supports the Commission's finding that he was not "able to work." Crawford wanted to work, but a medical professional told him that he could not. (Tr1. 45). When Crawford found jobs, his condition prevented him from being able to remain employed. (Tr1. 34). He could not control the fact that he hears voices, talked to himself and paced. (Tr1. 34). Thus, his condition rendered him not "able to work."

On March 22, 2010, Crawford told a Division deputy that he could not work and that he had not been able to work for a long time. (Tr1. 126). Crawford's testimony at the hearing was consistent with his statement to the deputy.

The decision of the SSA is further evidence that Crawford is not "able to work." The SSA found that Crawford heard voices all the time, becomes

violent when stressed and that working around other people and being supervised causes Crawford stress. (Tr1. 75, 77). These facts corroborate Crawford's testimony that he was often fired from jobs because he talked to himself, paced, and heard voices around customers. (*See* Tr1. 34).

The SSA also found that a psychiatrist determined that Crawford could not work and was under psychiatric care. (Tr1. 75). This fact corroborates Crawford's testimony that his doctor believed that he could not work. (Tr1. 39).

Thus, there was ample evidence in the record of the limiting effects of Crawford's condition and that those limitations rendered him not "able to work."

Crawford argues that "[w]hether a claimant is "able to work" is tested by considering if he or she is "available for work." (Crawford Subs. Br. 44). That statement is not entirely correct. There is some overlap between the analysis of a claimant's "ability to work" and "availability for work," but like a Venn diagram, the analyses also have some characteristics that are different. For instance, the fact that a claimant makes his or herself available by having the time and inclination to work, does not mean that the claimant is also employable.

Here, Crawford had an inclination to work, he looked for jobs and found work, but he was not employable. (Tr1. 45, 46, 47, 48, 69). He could not

retain the jobs once his condition manifested itself in a work environment. (Tr1. 34, 75).

Crawford argues that there is no evidence that his condition was the reason that his jobs were short lived. (Crawford Subs. Br. 45). To the contrary, Crawford himself testified that he lost jobs because of his condition. (Tr1. 34). Also, the SSA determination states that Crawford "was fired from a number of jobs" because of his condition. (Tr1. 75).

Crawford relies on *Lauderdale v. Div. of Employment Sec.*, 605 S.W.2d 174 (Mo. App. E.D. 1980) to support his argument that he was "able to work." (Crawford Subs. Br. 44). In that case, the court only answered the question of whether a claimant who took a maternity leave of absence was "available for work." *Lauderdale*, 605 S.w.2d at 177. The court did not analyze whether the claimant was "able to work." Here, the Commission found that Crawford was not "able to work." Therefore, *Lauderdale* is not instructive here.

If *Lauderdale* is instructive, *Lauderdale* supports the Commission's finding that Crawford was not "able to work." There, the court held that Lauderdale was not "available for work" because she did not have a genuine attachment to the labor market. *Id*. at 178. She was not "available for work" because the conditions that caused her to take maternity leave, swelling in her feet and legs, substantially limited her from performing suitable work for other employers. *Id*. at 176, 178.

Here, the evidence is that Crawford was fired from jobs because of his condition. (Tr1. 34, 77). Like in *Lauderdale*, the condition that caused him to lose those jobs substantially limited him from performing suitable work for other employers.

For these reasons, the Commission properly found that Crawford was not "able to work."

b) Crawford failed to preserve the argument that the Commission's ineligibility decisions are void because the Division lacked good cause to reconsider the prior determinations.

The Division has authority to reconsider a prior determination, for good cause, not later than one year following the end of a benefit year. Section 288.070.5,Cum. Supp. RSMo. 2011. Crawford's benefit year began on July 26, 2009 and ended on July 31, 2010. (LF 1). The Division reconsidered determinations of eligibility ("redetermination") for that benefit year on March 31, 2010, within the statutory time frame. (LF 2, 44). The Appeals Tribunal and the Commission affirmed the redeterminations. (LF 11, 19, 53, 61).

Crawford argues that the Commission's decisions are void because the Division did not have good cause to reconsider his eligibility for benefits. (Crawford Subs. Br. 35-38). Crawford did not raise this issue before the

Commission. Appellate courts can only address issues that were brought before the Commission. § 288.210, RSMo. 2000; *see also Perry v. Tiersma*, 148 S.W.3d 833, 835 (Mo. App. S.D. 2004). An issue appropriate for but not addressed with the Commission cannot be litigated on appeal. *St. John's Mercy Health System v. Div. of Employment Sec.*, 273 S.W.3d 510, 516 (Mo. banc. 2009).

In *St. John's*, this Court found that the employer, St. John's, did not preserve an issue for appeal because it "did not include the issue in its application for review to the [Commission] and the [Commission] did not address the issue." 273 S.W.3d at 516. In that case, the Division found that claimants who went on strike challenging unfair labor practices were not eligible for unemployment. *Id*. at 514. The Appeals Tribunal reversed and the Commission affirmed the decision of the Appeals Tribunal. *Id*.

On appeal, St. John's argued that the Commission's ruling was invalid without a deputy determining the claimants' total or partial eligibility. *Id*. at 516. St. John's had not raised this issue before the Commission. *Id*.

The court held that it would have been appropriate for St. John's to raise the issue before the Commission. *Id*. Because St. John's failed to do so, the issue was not preserved for judicial review. *Id*.

Here, Crawford argues that the Commission's decisions are invalid because the Division did not have good cause to reconsider the prior

determinations. Like in *St. John's*, this matter was appropriate for the Commission to address because the Commission has authority to decide whether the Division had good cause. S*ee* § 288.200, RSMo. 2000. Also like in *St. John's*, Crawford raised the issue for the first time on appeal. Crawford did not raise the issue before the Appeals Tribunal or before the Commission. (LF 5-6, 16-17). Therefore, the issue is not preserved for judicial review.

Crawford argues that he preserved the issue of good cause because he challenged the Division's ineligibility determinations. (Crawford Subs. Br. 38). Whether the Division had good cause to reconsider a prior determination is a separate issue from whether a claimant is eligible for benefits. The Commission cannot assume that a claimant who appeals an ineligibility determination is also arguing that the Division lacked authority to issue the determination. The claimant would have to make this clear in his appeal. Thus, Crawford cannot and did not preserve the issue of good cause by challenging his ineligibility for benefits.

Crawford argues that a claimant like him "does not waive an issue by failing to list every point or specifically identify every argument in his Application for Review." (Crawford Subs. Br. 38). It is unclear what Crawford means when he refers to claimants like him. He was not acting *pro se*. Crawford was represented by counsel when he appealed the deputy's

determination and when he filed the application for review to the Commission. (LF 5-6, 16-17).

Claimants are not required to "specifically identify every argument" in their applications for review, but claimants are required to raise the issue that they want the Commission to address. *St John's,* 273 S.W.3d at 516. The Commission does not and is not required to assume that a claimant challenges every action that occurred below on every colorable basis.

Claimants have some responsibility to raise issues they want the Commission to consider, especially if the issue is not apparent. Here, it was apparent that Crawford appealed on the grounds that he was "able to work." It was not apparent that Crawford believed that the Division acted outside of the scope of its authority in reconsidering Crawford's eligibility for benefits.

If a claimant wants to challenge an issue besides that addressed in the Appeals Tribunal's order, and that issue is appropriate for the Commission to decide, the claimant must raise that issue in its application for review to the Commission.

Crawford's good cause argument should be dismissed because the issue was not preserved for appeal.

c) The Division had good cause to reconsider its prior determinations after learning that Crawford was not "able to work."

Even if this Court finds that Crawford preserved the issue of good cause, his point should be denied because the Division had good cause to reconsider the prior determinations. Whether the Division had good cause for reconsideration is reviewed for abuse of discretion. *See Wagner v. Unemployment Compensation Com'n*, 198 S.W.2d 342 (Mo. banc 1946) (the Division's reconsideration cannot be arbitrary); *see also Parker v. Unemployment Compensation Com'n of Mo.*, 223 S.W.2d 22, 22 (Mo. K.C. Dist. App. 1949) (the Division acted within the scope of its authority in reconsidering prior determinations).

If there is good cause, the Division can reconsider any determination on any claim within one year following the end of the benefit year. § 288.070.5, RSMo. This Court has held that good cause is established when the Division initially erred in its treatment of the facts or when the Division awarded (or denied) benefits, but after learning additional facts, the award (or denial) of benefits is now in conflict with the express language of Chapter 288 or "out of harmony" with its "remedial purpose." *Wagner*, 198 S.W.2d at 346.

Wagner is instructive here. In that case, the Division had good cause to reconsider prior determinations because the deputy learned new material facts which were unknown to the Division at the time it issued its earlier determinations. 198 S.W.3d at 346. Wagner was laid off by her employer, a glass company, due to lack of work. *Id.* at 343. The Division awarded

Wagner benefits for four weeks finding that she was able to and available for work. *Id.*

The Division investigated the prior determinations after learning that Wagner had turned down a job offer. *Id.* The Division learned that Wagner had not been looking for work. *Id.* She did not want to consider other jobs because she was hoping that she would be recalled to work for the glass company. *Id.* at 344. The Division found that based on these facts, Wagner was not available for work and her receipt of benefits was contrary to the express provisions of the employment security law. *Id.* at 346. The court affirmed the Division's determination that Wagner was not available for work. *Id.*

"When facts indicate that a claimant for unemployment compensation is not available for work, the deputy not only may but should reconsider his initial decision allowing benefits." *Parker*, 223 S.W.2d at 23. A deputy that learns that a claimant is not able to work has the same obligation because the award of benefits is in conflict with the express language of the statute and out of harmony with its remedial purpose. *Wagner*, 198 S.W.2d at 346.

Here, the Division acted within the scope of its authority in reconsidering the prior determinations. First, the Division's reconsideration was within the statutory time frame. Crawford's benefit years began on July 27, 2009 for regular unemployment and on January 24, 2010 for EUC. (LF 1;

Tr2. 198). Crawford was still within the benefit year for both claims when the Division reconsidered its earlier determinations on March 31, 2010. (Tr1. 127, 141). Therefore, the Division reconsidered its determinations prior to the expiration of one year following the end of the benefit year. § 288.070.5, RSMo.

Second, the Division had good cause for reconsidering the prior determinations. Like in *Wagner*, the Division reconsidered its prior determinations because the Division learned new material facts which were unknown to it when it made its prior determinations. The Division awarded Crawford benefits for the week beginning July 26, 2009 and from December 20, 2009 through March 20, 2010 based on his weekly assertions that he was "able to work." (Tr2. 163, 178-187, 199-202). On March 22, 2010, Crawford told a deputy that he was not able to work and that he had not been able to work for some time. (Tr1. 126). This was new information and was contrary to what he had previously told the Division. Based on this information, Crawford's award of benefits was in direct conflict with section 288.040.1(2), which requires that claimants be "able to work" and "available for work." § 288.040.1(2), RSMo. The deputy had a duty to reconsider the prior determinations in light of this new information. *Parker*, 223 S.W.2d at 23.

Crawford argues that the deputy did not learn "of any new material facts about [his] health or search for work…The only new information which

was brought to the [deputy's] attention was the [decision] of the Social Security's Administration[ ]." (Crawford Subs. Br. 35). That is incorrect. When Crawford notified the Division that he was now eligible for Social Security disability, he also told the Division that he was not able to work and *had not been able to work for some time*. (Tr1. 126). As stated previously, this was new information because prior to that Crawford had certified that he was able to work during the relevant period.

Additionally, the SSA's determination can constitute new material information. While the Commission did not find that all claimants who receive Social Security disability are *per se* unable to work, (LF 18, 60), the award of disability benefits can be a sufficient basis for the Division to conduct an investigation and reconsider a prior determination. The SSA determination included information that medical professionals had concluded that his disability prevented him from working, he was potentially dangerous to himself and that his conditions worsened when he had a job. (Tr. 75, 77).

The Commission had good cause for reconsidering the prior determinations.

d) The Commission's ineligibility decisions did not violate sections 288.215 and 288.040.4(3) or 8 C.S.R. § 10-3.050.

Crawford argues that section 288.215 prohibits the agency from relying on the decision of the SSA in finding him ineligible for unemployment.

(Crawford Subs. Br. 42). Section 288.215 states that the Division and Commission are not bound by the "findings of fact or law in any proceeding not brought under [Chapter 288.]" § 288.215, RSMo. 2000. Section 288.215, however, does not preclude the Commission (or the Division) from considering the findings and conclusions from an independent proceeding in an unemployment case. *K & D Auto Body, Inc. v. Div. of Employment Sec.*, 171 S.W.3d 100, 113 (Mo. App. W.D. 2005).

"[T]hat the findings of fact, conclusions of law, judgment, or orders entered in such independent proceeding are not *binding* or *conclusive* upon the Commission or the Division's Appeals Tribunal does not mean they are to be or must be entirely ignored." *Id.* As a result, the Commission was free to consider and rely on the decision of the SSA in support of its independent decision on the matter. *See Scrivener Oil Co., Inc. v. Crider*, 304 S.W.3d 261, 266 (Mo. App. S.D. 2010) (the Commission is free to believe, all, none, or some of the evidence before it).

Furthermore, the Commission did not consider itself bound by the Social Security determination. It specifically rejected such a position. The Commission found,

> We are persuaded that there could be certain circumstances where a claimant is determined disabled by the SSA but able to work under section 288.040.1(2), RSMo.[,] of the Missouri

> Employment Security Law[.] But we are also persuaded that the case before us is not that situation.

(LF 18, 60).

The Commission did not simply find Crawford not "able to work" because the SSA determined that he was disabled from working. (LF 18, 60). The Commission considered and weighed all the evidence in the record in reaching that conclusion. The Commission found that Crawford was not "able to work" because Crawford did not provide sufficient information to prove that he was. *Frisella*, 269 S.W.3d at 899.

Crawford argues that the ineligibility and overpayment determinations violate section 288.040.4(3) and 8 C.S.R. § 10-3.050. (Crawford Subs. Br. 28-31). Section 288.040.4(3) provides, in part, that the Division cannot reduce a claimant's unemployment compensation by the amount of Social Security benefits that the claimant receives. § 288.040.4(3), RSMo. This statute was not violated here.

The Division did not offset Crawford's Social Security benefits against his unemployment. Crawford has an overpayment because he received unemployment benefits during periods of ineligibility, not because his

unemployment was reduced by his Social Security payments.[8] Likewise, the Commission found him ineligible because he was not "able to work," not because he was entitled to Social Security. (LF 18, 60).

Also, the Division did not violate 8 C.S.R. § 10-3.050. 8 C.S.R § 10-3.050(3) states, "[w]henever the claimant is otherwise eligible, no unemployment benefits shall be denied or reduced for any week of unemployment ending prior to the date of his/her receipt of the final decision allowing any payment which the claimant is required by this rule to report to the division."

Payments that a claimant is required by the rule to report to the division are "remuneration(s) in the form of compensation for temporary partial disability (workers' compensation) and any pension paid in whole or in part from funds furnished by an employing unit, to the extent that the pension is provided from funds not provided by the claimant[.]" 8 C.S.R. § 10-3.050(1). The Social Security payments are not workers' compensation or

[8] There is no evidence that the Division deputy knew how much Crawford was entitled to receive from Social Security when issuing the redeterminations. The Social Security records were provided at the hearing. *Compare* Tr1. 72-113 and 126.

pensions paid by the employer. Thus, 8 C.S.R. § 10.3.050(3) is not referring to Social Security payments.

II. Crawford's argument that the Division cannot recover the overpayments under section 288.380.14, RSMo., is not ripe for judicial review because the Division has not attempted recovery. Even assuming the argument is ripe, the Division has the authority to pursue the overpayments using the methods listed in section 288.380.14 because that is what the Missouri legislature intended and the statute expressly provides that the Division has such authority, and section 288.380.14 does not conflict with section 4005(b) and (c) of the Emergency Unemployment Compensation Act of 2008. (In response to Crawford's Point II)

a) The issue of whether the Division can recover the overpayments under section 288.380.14 is not ripe for judicial review.

Crawford argues that the Division cannot recover the overpayment and if the Division has any authority to recover the overpayment, such authority is limited to deducting the amounts against future benefits that Crawford will otherwise be entitled to receive under section 288.380.13, RSMo. ("subsection 13"). (Crawford Subs. Br. 48-58). This argument is not ripe for judicial review. A controversy is not ripe "when the question rests solely on a

probability that an event will occur." *Local 781 Int'l Ass'n of Fire Fighters, AFL-CIO v. City of Independence,* 947 S.W.2d 456, 460 (Mo. App. W.D. 1997). In contrast, a controversy is ripe when "sufficient immediacy" is established. *Id*.

Like jurisdiction, ripeness "is not waived by the failure of a party to raise it at the earliest opportunity." *Local 781 Int'l Ass'n of Fire Fighters, AFL-CIO v. City of Independence,* 947 S.W.2d 456, 461 (Mo. App. W.D. 1997). Therefore, the fact that the Division did not raise the issue of ripeness before the Missouri Court of Appeals-Eastern District does not prohibit the Division from raising this issue now.

Sufficient immediacy has not been established. The question before the Court rests solely on a possibility that the Division will attempt recovery using the methods set forth in section 288.380.14, RSMo. ("subsection 14"). The Division has not attempted recovery. The Division has only decided that Crawford is ineligible for benefits and that he was overpaid.

In situations like this where a claimant received unemployment during periods of ineligibility, there are three steps: 1) the claimant's eligibility for benefits; (*See* Tr1. 127, 141), (2) the overpayment; (*See* Tr1. 127, 141), and (3) recovery, *See* §§ 143.784-785, RSMo. 2000, 288.160.5, RSMo. 2000, and 313.321, RSMo.

The Division is required to give claimants notice when attempting recovery using the methods set forth in subsection 14. *See* § 143.784, RSMo. 2000 (state income tax intercepts);[9] *see also* § 288.160, RSMo. 2000 (assessments); and § 313.321 (lottery winning intercepts).

Claimants have the right to appeal the Division's assertion of its right to collect the overpayment; claimants also have the right to judicial review, once he or she has exhausted all administrative remedies. *See* §§ 143.784-785 (state income tax intercepts); *see also* §§ 288.160.5, RSMo. 2000, 288.190, RSMo., 288.200, RSMo. 2000 and 288.210, RSMo. (claimants have the right to petition for reassessment, after that these claimants have the same rights to appeal as claimants appealing their denial of benefits); *see also* § 313.321 (lottery winning intercepts follow the same procedure for state income tax intercepts).

For instance, when intercepting state tax refunds, the Division must notify claimants that some or all of their tax refund will be intercepted. § 143.784, RSMo. 2000. After receiving this notice, claimant has a right to

[9] Although the statute allows the Division to intercept federal tax refunds, §§ 288.175 and 288.380, RSMo., the Division currently does not have processes set up to collect using this method.

contest the interception and ultimately the right to judicial review of the agency's decision. §§143.784-785, RSMo.

The agency has only decided that Crawford is ineligible for benefits and that he was overpaid due to error or omission. (LF 18, 33, 60, 74). The agency has not decided on recovery. The only reason the Appeals Tribunal cited subsection 13 in its decision was to identify the type of overpayment found. (LF 33, 73-74). Subsection 13 was not cited as a recovery attempt.

Until such time that the agency attempts recovery and Crawford exhausts his administrative remedies for appealing such recovery, this issue is not ripe for judicial review.

b) The Division has the right to pursue recovery of the overpaid benefits using the methods listed in subsection 14.

Even if the Court finds that the issue of recovery is ripe for judicial review, the Division is not limited to seeking recovery against Crawford's future benefits as set forth in subsection 13. The Division can also seek recovery using the methods set forth in subsection 14. This is an issue of statutory construction, which is reviewed *de novo*. *Difatta-Wheaton v. Dolphin Capital, Corp.*, 271 S.W.3d 594, 595 (Mo. banc 2008).

The recent legislative changes to section 288.380 illustrate that the legislature intended to grant the Division such authority. In 2006, the

legislature amended section 288.380 with H.B. 1456. H.B. 1456, 93rd G.A., 2d. Sess. (2006). Prior to this amendment the relevant provisions read:

> 11. Any person who, by reason of the nondisclosure or misrepresentation by such person or by another of a material fact, has received any sum as benefits pursuant to this chapter while any conditions for the receipt of benefits imposed by this chapter were not fulfilled in such person's case, or while he or she was disqualified from receiving benefits, shall, in the discretion of the division, either be liable to have such sums deducted from any future benefits payable to such person pursuant to this chapter or shall be liable to repay to the division for the unemployment compensation fund a sum equal to the amounts so received by him or her*, and such sum shall be collectible in the manner provided in sections 288.160 and 288.170 for the collection of past due contributions*.
>
> 12. Any person who by reason of any error or omission or because of a lack of knowledge of material fact on the part of the division, has received any sum of benefits pursuant to this chapter while any conditions for the receipt of benefits imposed by this chapter were not fulfilled in such person's case, or while such person was disqualified from receiving benefits, shall after

> an opportunity for a fair hearing pursuant to subsection 2 of section 288.190 have such sums deducted from any further benefits payable to such person pursuant to this chapter, provided that the division may elect not to process such possible overpayments where the amount of same is not over twenty percent of the maximum state weekly benefit amount in effect at the time the error or omission was discovered. *Recovering overpaid unemployment compensation benefits which are a result of error or omission on the part of the claimant shall be pursued by the division through billing and set offs against state income tax refunds.*

288.380.11-12, RSMo. 2000 (Emphasis added).

In 2006, the legislature amended section 288.380 in part by moving these provisions to sections 288.380.12 ("subsection 12") and 13 respectively, and deleting the portions italicized above. H.B. 1456, 93rd G.A., 2d. Sess. (2006).

In 2006, the legislature also created subsection 14. Subsection 14 includes the deleted language from subsections 12 and 13 and lists additional methods of recovery. Subsection 14 reads:

> *Recovering overpaid unemployment compensation benefits shall be pursued by the division against any person receiving such*

> *overpaid unemployment compensation benefits* through billing, setoffs against state and federal tax refunds to the extent permitted by federal law, intercepts of lottery winnings under section 313.321, and collection efforts as provided for in sections 288.160, 288.170, and 288.175.

(Emphasis added).

"The primary rule of statutory interpretation is to ascertain the intent of the legislature from the language used, to give effect to that intent if possible, and to consider the words in their plain and ordinary meaning." *In re Boland*, 155 S.W.3d 65, 67 (Mo. banc 2005). "When determining legislative intent, the court should consider the history of the statute and the problem it sought to address." *Campbell v. Labor and Indus. Relations Com'n*, 907 S.W.2d 246, 249 (Mo. App. W.D. 1995).

In *Campbell*, the court held that the legislature created overpayment provisions "to ensure that the unemployment compensation fund [was] not depleted except for valid benefit payments, thus preserving the limited resources of the fund." *Id.* at 250. The court discerned the legislature's intent by the fact that the legislature adopted overpayment provisions at the same time that it adopted provisions that required benefits to be paid to claimants when due, even if the claimant's right to benefits was being

appealed. *Id*. Prior to that time, claimants were not paid benefits until eligibility decisions were final. *Id*.

The purpose of subsection 14 is the same as the overpayment provisions at issue in *Campbell*: to allow the Division to collect overpayments for benefits that were wrongly paid to claimants, and thus to avoid depleting unemployment reserves by paying benefits to ineligible claimants.

In the prior version of section 288.380, the Division's options for recovery were dependent upon the type of overpayment. If the overpayment was one of nondisclosure or misrepresentation of a material fact, then the Division could collect from future benefits, have the claimant repay, or use the methods in sections 288.160 and 288.170. §288.380.11, RSMo. 2000. If the overpayment was due to error or omission or because of a lack of knowledge of material fact on the part of the Division, the Division could collect from future benefits, setoffs against state income tax refunds and billing. § 288.380.12, RSMo. 2000.

In 2006, when the legislature amended section 288.380, it was to allow the Division the ability to pursue recovery using any of the collection methods available to it regardless of the type of overpayment. That is why the statute expressly provides, "recovering overpaid…benefits shall be pursued by the division against any person receiving such overpaid…benefits" and enumerates the methods of recovery to be used. §288.380.14, RSMo.

The intent of the legislature and the plain and ordinary meaning of the statute is that the Division can use any of the methods of recovery listed in subsection 14 to recover overpayments. This has been the Division's interpretation of the statute and this is the interpretation that the Division asks the Court to adopt. *Fugate v. Jackson Hewitt, Inc.*, 347 S.W.2d 81, 87 (Mo. App. W.D. 2011) (courts give great weight to the interpretation and construction of a statute by the agency charged with its administration).

Crawford's interpretation would result in the Division being limited in how it can recover overpayments, which is contrary to legislative intent and the express language of the statute.

Prior to the passage of House Bill 1456, some of the recovery methods listed in subsection 14 used to be in subsections 12 and 13. H.B. 1456, 93rd G.A., 2d Sess. (2006). For instance, subsection 13, which Crawford argues applies here, used to permit recovery by billing and setoffs against state income tax. § 288.380.12, RSMo. 2000. In 2006, the legislature moved these methods of recovery to subsection 14. H.B. 1456, 93rd G.A., 2d Sess. (2006). Crawford's interpretation presumes that by doing so, the legislature wanted to strip the Division of the authority to recover against him using these methods. Such an interpretation is contrary to the legislative intent of having unemployment reserves used for those who are entitled. It is also contrary to the express language of subsection 14 which states that the

recovery methods listed therein are to be used for all overpayments. As a result, this Court should not adopt Crawford's interpretation of subsection 14. *OHM Properties, LLC v. Centrec Care, Inc.*, 302 S.W.3d 170, 173 (Mo. App. E.D. 2009) ("a statute must not be interpreted narrowly if such an interpretation would defeat the purpose of the statute.")

An interpretation that subsection 14 only applies to overpayments that fall under subsection 12 would also be contrary to legislative intent and the express language of the statute. Subsection 12 states that the Division can recover by deducting the overpayment from future benefits or making the claimant liable to "repay" the Division. Subsection 14 sets forth methods of "recovery." The "recovery" methods listed in subsection 14 are not limited to cases where a claimant is liable to "repay" under subsection 12.

The term "repay" refers to instances where a claimant voluntarily repays the overpayment by sending a payment to the Division. The term "recovery" refers to instances where the Division takes an action to collect the overpayment, such as intercepting income tax refunds, garnishing wages, or intercepting lottery winnings. If the legislature intended the recovery methods listed in subsection 14 to be restricted to subsection 12 overpayments, the legislature would have added the language to subsection 12 itself or otherwise indicate that intent in the language of subsection 14. The legislature made these changes for a reason. *State v. Rousseau*, 34

S.W.3d 254, 261 (Mo. App. W.D. 2000) (it is presumed that the legislature will not enact unnecessary laws). Based on the legislature's actions in amending section 288.380, it is apparent that the legislature intended subsection 14 to be used for all overpayments.

Crawford argues that such an interpretation of subsection 14 renders the rest of section 288.380 "useless verbiage" and subsection 13 "meaningless." (Crawford Supp. Br. 52). That is incorrect.

To begin with, subsection 14 clearly does not render subsections 1 through 11 and 15 "useless verbiage." For instance, subsection 1 voids agreements by workers to waive, release or commute his or her rights to unemployment benefits. § 288.380.1, RSMo. Subsection 9 makes it unlawful for persons to knowingly make a false statement or representation in order to obtain or increase unemployment benefits. § 288.380.9, RSMo. Also, subsection 10 cancels wage credits for claimants who willfully fail to disclose earned wages or other information that would have rendered the claimant ineligible for benefits. § 288.380.10, RSMo. These provisions all operate independently of subsection 14.

Additionally, subsection 14 does not render subsections 12 and 13 "meaningless." The methods of recovery listed in subsection 14 are not listed in subsections 12 and 13. *Compare* §§ 288.380.12-13 and 14, RSMo. Likewise, the method of recovery listed in subsections 12 and 13 is not listed

in subsection 14: deducting the sums of the overpayments from any future benefits that a claimant would be entitled to. *Compare* §§ 288.380.12-13 and 14, RSMo. Thus, a reasonable interpretation is that the legislature retained subsections 12 and 13 to allow the Division to continue to deduct overpayments from future benefits where the overpayment fell under subsection 12 or 13, and that the legislature created subsection 14 to allow the Division to recover all overpayments using the methods listed therein.

The Division concedes that given this interpretation there is no distinction between overpayments that fall under subsection 12 and subsection 13. However, to interpret section 288.380 differently would be contrary to legislative intent in creating subsection 14, the purpose of the overpayment provisions in general, and the express language of the statute.

c) Section 4005(b) and (c) of the Emergency Unemployment Compensation Act of 2008 (EUC Act of 2008) does not limit the Division's authority to recover EUC overpayments under subsection 14.

In a recent decision, *Hergins v. Div. of Employment Sec.*, WD 73190, ___ S.W.3d ___ (Mo. App. W.D. March 6, 2012), the Missouri Court of Appeals-Western District held that section 4005(b) and (c) of the EUC Act of 2008 ("section 4005(b) and (c)") preempts Missouri's recovery laws to the extent that those laws do not permit the Division to consider waiving EUC

overpayments. Slip Op. at 9-11.[10] The court's decision is inconsistent with the United States Department of Labor's ("USDOL") interpretation of section 4005(b) and (c) which provides that the Division does not have to consider waiving EUC overpayments. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984) (when a statute is ambiguous, then courts should defer to reasonable interpretations of the agency).

The Employment and Training Administration Advisory System of the USDOL issues Unemployment Insurance Program Letters ("UIPLs") to state employment security agencies interpreting Federal law requirements pertaining to unemployment compensation. 62 Fed. Reg. 40, 9208 (1997). On July 7, 2008, USDOL issued UIPL 23-08 interpreting the EUC Act of 2008. UIPL 23-08 (included in the Appendix). Regarding section 4005(b) and (c), the UIPL provides that state agencies are not required to consider waiver and that section 4005(b) and (c) is purely optional.

The UIPL states in relevant part,

> (2) Optional EUC08 Waiver. Under Section 4005(c) of the Act, any state that does not have a state waiver provision or

[10] This decision came down after Crawford filed his substitute brief. Also, *Hergins* is not final. The Division has filed a Motion for Rehearing, and alternatively, an Application for Transfer in that case.

> does not have a state waiver provision that meets both the "fault" and "equity and good conscience" requirements stated in paragraph (1) above may adopt this optional EUC08 waiver. If the state elects to implement the optional EUC08 waiver, it may not do so until it has issued agency operating instructions for staff to follow.

UIPL 23-08, p. A-12.

USDOL's interpretation of the EUC is that even if a state's law does not permit waiver of regular unemployment benefits, the state may choose to implement a waiver process for EUC overpayments (but it may also choose not to). The Western District incorrectly held that the EUC mandates that all states implement an EUC waiver process and that any Missouri law to the contrary is overridden by this federal requirement.

As UIPL 23-08 makes clear, the Division had authority to implement a waiver process for EUC overpayments but was not required to do so. The Division chose not to implement the waiver process because it determined that the administrative costs in implementing the process would be too great and because of fairness. The waiver process would have taken time away from other aspects of the Division's responsibilities including the timely processing of claims, issuing determinations and holding hearings.

Also, the Division determined that it was fair to apply the same requirements for overpayments of EUC and overpayments of regular benefits. If two claimants were wrongly paid benefits for the same reason, it is not fair that one claimant gets a waiver because he or she received EUC funds and the other claimant does not simply because he or she received regular benefits. The Division determined that fairness required that these claimants be treated the same.

For these reasons, Section 4005(b) and (c) does not restrict the Division's authority to recover Crawford's overpayment for January 24 through March 20, 2010 using the methods listed in subsection 14.

III. The Commission's decisions do not violate the Supremacy Clause because it is not in conflict with the Social Security Act or 20 C.F.R. 416. (In Response to Crawford's Points I and II)

a) The decisions do not conflict with or frustrate the purpose of the Social Security Act.

Crawford argues that the ineligibility decisions and any attempts by the Division to recover the overpayments violate the Supremacy Clause, Art. VI, Clause 2 of the U.S. Constitution, in that they conflict with or frustrate the purpose of the SSA. (Crawford Subs. Br. 28-32, 58-60). Crawford relies on *Nash v. Florida Indus. Com'n*, 389 U.S. 235 (1967), to support his argument.

In *Nash* the United States Supreme Court invalidated Florida's interpretation of one of its unemployment laws because it frustrated the purpose of the National Labor Relations Act ("NLRA"). *Id*. at 239-240. The Florida Unemployment Compensation Law provided that claimants who were unemployed due to "a labor dispute in active progress" with their last employer were disqualified from receiving unemployment benefits. *Id*. at 236-377.

Nash, who previously had been out on strike against her employer, was reinstated to her former position, pursuant to a union agreement. *Id*. at 236. *Id*. Five weeks later, May 16, 1965, the employer laid her off. *Id*.

On June 17, 1965, Nash filed a charge against the employer alleging that she was laid off for participating in union activities in violation of the NLRA. *Id*. She sought reinstatement and back pay. *Id*. On October 5, 1965, the employer reinstated Nash to her former position. *Id*. Her charge of the NLRA violation was still pending. *Id*.

Florida found that Nash was eligible to receive unemployment benefits from May 16 up to June 17, 1965, and that she was ineligible from June 17, 1965 on because her actions in filing an unfair labor practice charge brought her under the state's ineligibility provision

because her unemployment then became "due to a labor dispute." *Id*. at 237.

The Court found that Florida's interpretation of its statute was a violation of the Supremacy Clause. *Id*. at 239-40. Florida's interpretation of its statute left employees who believe that their discharge was an unfair labor practice with two choices: (1) keep quiet and collect unemployment until they find a new job; or (2) file a charge challenging an unfair labor practice, surrender their unemployment compensation and risk financial ruin if they did not succeed in the labor dispute. *Id*. at 239. Congress enacted the NLRA to prevent unfair labor practices and to allow employees the right to challenge unfair labor practices. *See id*. Florida's interpretation of its statute impeded the NLRA's purpose. *Id*. at 239-240.

The problem in *Nash* was that claimants who filed charge of an unfair labor practice under the NLRA were automatically found ineligible for unemployment benefits. Florida claimants had to choose between challenging an unfair labor practice and filing for unemployment. That is not the situation here.

Unlike in *Nash*, claimants like Crawford who want to pursue Social Security benefits do not have to choose between filing for Social Security and filing for unemployment. Claimants can pursue both and the Division does not deny claimants unemployment simply because they applied for Social

Security. Claimant is proof of this fact. According to Crawford, the Division knew that he had filed for Social Security in the beginning, when he received unemployment. (Tr1. 70).

Similarly, the Division does not find claimants ineligible for benefits simply because they are receiving Social Security. (LF 18, 60). The Commission specifically rejected such a position. (LF 18, 60). The Commission found Crawford ineligible for benefits because he was not "able to work." (LF 18, 60).

Crawford's overpayment resulted from his not being "able to work," not his application for and receipt of Social Security. The Commission's interpretation of §§ 288.040.1(2) and 288.380.14, RSMo., does not frustrate the purpose of the SSA and the Commission's decisions do not violate the Supremacy Clause.

b) The ineligibility and overpayment decisions do not conflict with 20 C.F.R. 416.

Crawford appears to argue that the ineligibility determinations conflict with the SSA's decisions regarding Crawford's entitlement to SSI payments. (Crawford Subs. Br. 28-32). Crawford argues that the SSA offset Crawford's SSI by the amount of unemployment that he received pursuant to 20 C.F.R. 416, and thus, a subsequent decision by the Division finding that he was

ineligible to receive the unemployment benefits would be "improper." (Crawford Subs. Br. 28-32).

The ineligibility determinations do not violate 20 C.F.R. 416. 20 C.F.R. 416.1104 and 1120-1121 authorize the SSA to offset a claimant's unemployment benefits against their SSI. The federal regulation does not preclude a state agency from finding that a claimant who is entitled to SSI is not "able to work." Not all claimants who receive SSI are entitled to unemployment benefits. Also, the fact that the SSA deducts unemployment payments from a claimant's SSI does not mean that state agencies are precluded from issuing overpayments when those claimants received unemployment during periods of ineligibility.

Crawford argues that "[i]t would be absurd to imagine that after the [SSA found that Crawford is disabled,] the Division could legitimately confirm to the SSA that [ ] Crawford had received unemployment benefits in certain amounts for particular weeks, wait for the SSA to reduce [Crawford's] disability benefits [ ], revoke his eligibility for those benefits two days later, and then demand that he pay to the Division the exact amount withheld by the SSA." (Crawford Subs. Br. 30).

There is no evidence in the record of how the SSA confirmed Crawford's unemployment.

The Division could not have found Crawford not "able to work" until the Division had information indicating that Crawford was not "able to work." To receive weekly unemployment benefits a claimant has to certify that he is able to and available for work. *See* § 288.040, RSMo. For every week from July 26, 2009 through March 20, 2010, Crawford told the Division that he was able to work. In page 137 of the first volume of the transcript is a summary of Crawford's responses when he filed his weekly claim for benefits. On the right side of the page there are two columns labeled "A." The first "A" indicates where Crawford was asked if he was "able to work." Crawford answered yes, "Y," for each of these weeks.

It was not until after Crawford learned that he was eligible for Social Security benefits that he told the Division that he was not "able to work" and had not been "able to work" for some time. (Tr1. 126). At that point, Crawford had made inconsistent statements to the Division. It was for that reason that the Division issued a redetermination.

Furthermore, after the Division issued the redetermination and overpayment, Crawford still had more than six weeks to appeal the SSI decision. (*Compare* Tr1. 84 *and* Tr1. 127, 141, Tr2. 191, 205). The ineligibility and overpayment determinations were mailed on March 31 and April 13, 2010. (Tr1. 127, 141; Tr2. 191, 205). Crawford's appeal of the SSI decision was due to the SSA by June 2, 2010. (Tr1. 84). The Division's

authority to collect the overpayment is not dependent on whether or not Crawford timely appealed the SSA decision regarding his SSI payments.

Conclusion

The Division requests that this Court affirm the Commissions ineligibility and overpayment decisions because Crawford received unemployment benefits during periods of ineligibility.

Respectfully submitted,

/s/ Jeannie Desir Mitchell
JEANNIE DESIR MITCHELL
Missouri Department of Labor and Industrial Relations
421 E. Dunklin St.
Jefferson City, MO 65109
PH. 573-751-3844
FAX. 573-751-2947
Jeannie.Mitchell@labor.mo.gov
ATTORNEY FOR RESPONDENT

Certificate of Compliance and Service

I hereby certify:

1. That the attached substitute brief complies with Rule 84.06(b) and contains 10,756 words, excluding the cover, this certification, the signature block, and the appendix, as counted by Microsoft Word;

2. The substitute brief was filed electronically with the Clerk of the Supreme Court of Missouri using the CM/ECF system.

3. A notification of the filing of this substitute brief was sent through the eFiling system this March 22, 2012, to:

/s/ Jeannie Desir Mitchell
Assistant General Counsel